

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 57 OF 2016**

SMT. ROSALINA COUTINHO E QUADROS
(DECEASED) THR. LRS.,

.... Appellant

Versus

MR. REMIGIO QUADROS (DECEASED)
THR. LRS. AND 2 ORS.,

.... Respondents

Shri John Abreu Lobo, Advocate for the Appellant.

Shri Vishwadh Sardessai, Advocate under Legal Aid for the
Respondent No. 2.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 8th DECEMBER, 2016

PRONOUNCED ON:- 4th JANUARY, 2017

ORDER:

The challenge in this appeal is to the judgment and order dated 30.06.2016, passed by the learned District Judge, South Goa at Margao in Regular Civil Appeal No. 170/2012. By the impugned judgment, the learned District Judge, while allowing the appeal has set aside the orders dated 13.08.2012 and 24.09.2012, passed by the learned Civil Judge Junior Division at Quepem, in Civil Miscellaneous Application No.128/1997/B, in Regular Civil Suit

No.9/1996/B and remanded the matter back to the Trial Court for deciding the application afresh.

2. The brief facts are that the appellant filed the aforesaid suit for injunction, restraining the respondents from carrying out construction work in the suit property and for mandatory injunction to demolish the structure already raised. On 13.02.1996, the learned Trial Court directed the parties to maintain status quo, which order according to the appellant, was violated by the respondents. In such circumstances, the appellant filed an application seeking direction to the respondents to stop the construction work, which was being undertaken. On 19.03.1996, the Trial Court allowed the said application in view of the affidavit in reply filed by respondent no. 2, undertaking to maintain status quo. However, the application for temporary injunction came to be subsequently dismissed on 23.06.1996, which was challenged by the appellant in Miscellaneous Civil Appeal No.38/1996. The learned District Judge partly allowed the appeal on 06.06.1996, "entitling each of the parties to enjoy the portion of the bandis standing just in front of the respective

houses". The parties were allowed to put up the said portion subject to the bye-laws of Town Planning Department and other Rules as may be applicable.

3. The appellant claims that the respondents violated the said order and commenced construction in the suit property without a construction license from the competent Authority. It was in these circumstances, that the appellant filed an application under Order 39, Rule 2-A of the Civil Procedure Code, 1908 (CPC, for short), before the Trial Court which was registered as Civil Miscellaneous Application No.128/1997/B. The learned Trial Court by an order dated 13.08.2012 found that the respondents/defendants were guilty of willful disobedience of the order dated 06.06.1996. On 24.09.2012, after hearing the respondents on sentence, the Trial Court directed the respondents/defendants to be detained in civil imprisonment "till the disobedience is cured/corrected or for a total period of three months, whichever is earlier". Feeling aggrieved, the respondents challenged the same before the learned District Judge.

4. It appears that during the pendency of the appeal, the respondents (appellants before the District Judge), filed an application for production of documents under Order XLI, Rule 27 of CPC comprising of a construction license dated 19.01.1996 alongwith renewal (part I) dated 20.01.1998 and receipts dated 20.01.1998 and 21.01.1998. The learned District Judge found that these documents were relevant to decide as to whether the construction carried out by the respondents, was in accordance with order dated 06.06.1996. It is in these circumstances that the appeal came to be allowed, directing the Trial Court to permit the respondents (appellants before the District Court), to produce the said documents on record and after affording the present appellant an opportunity to cross examine the respondents, on these documents, to decide the matter afresh. Feeling aggrieved, this appeal is filed.

5. I have heard Shri Lobo, the learned Counsel for the appellant and Shri Sardessai, the learned Counsel for respondent no.2.

6. It is submitted by the learned Counsel for the appellant that none of the conditions as stipulated under Order XLI, Rule 27 of CPC, were fulfilled in this case and as such, the learned District Judge was in error in allowing the production of additional documents. It is submitted that the respondents did not make out a case for permitting the production of documents, except that the license was inadvertently not produced before the learned Trial Court. It is submitted that such a ground is not sufficeint to allow production of documents, at the appellate stage. It is submitted that the documents sought to be produced, pertain to the year 1996 and as such, there was no plausible reason forthcoming, as to why, the same were not produced earlier. It is submitted that the power under Order XLI, Rule 27 of CPC is not to provide a party to fill in lacuna in it's case. It is submitted that the learned District Judge failed to frame an issue as to whether, the remand is necessary, as required under the provisions of Order XLI, Rule 25 of CPC.

Reliance is placed on the decision, in the case of **State of Gujarat Vs. Mahendrakumar Parshottambhai Desai, (2006) 9 SCC 772**, in order to submit that under Order XLI, the

Appellate Court cannot let in fresh evidence at the appellate stage, where even without such evidence, it can pronounce judgment in the case.

7. On the contrary, it is submitted by the learned Counsel for respondent no.2 that the only issue involved, before the Trial Court was whether the respondents have willfully disobeyed the order dated 06.06.1996 and as such, the documents produced were relevant and material. It is submitted that the learned District Judge has found that the documents are relevant for the said purpose and as such, no exception can be taken to the order of remand.

On behalf of the respondents, reliance is placed on the decision of the Supreme Court in the case of **Narayanan Vs. Kumaran and Others, (2004) 4 SCC 26**, in order to submit that the present appeal under Order 43, Rule 1(u) of CPC, would lie only on a substantial question of law. It is submitted that under Order XLI, Rule 27 of CPC, the Appellate Court has wide powers, to allow production of documents/evidence, where such documents/evidence is necessary.

8. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. It is now well settled that an appeal under Order 43, Rule 1(u) of CPC, challenging an order of remand has to be in compliance with the requirements of Section 100 of CPC (see the case of **Narayanan** (supra)). Thus, an appeal of the present nature can be entertained only where it involves a substantial question of law and not otherwise. In the present case, the order dated 06.06.1996, passed in Miscellaneous Civil Appeal No.38/1996, of which the breach is claimed reads thus:

"The appeal is partly allowed. Each of the parties is therefore entitled to the portion of the bandi/s standing just in front of their respective houses and extending up to the western side road in accordance with the agreement dated 19.12.1995 as per the demarcation made by the Commissioner in his plan which shall form part and parcel of this judgement."

It can thus be seen that the parties were permitted to effect construction in the portion of the bandis standing just in front of their respective houses. The appellant approached the Trial Court alleging breach of the said order on the ground that the respondents started construction without obtaining construction license or permission from the concerned Authority. This was precisely the breach of the order claimed. During the pendency of the appeal, the respondents filed an application under Order XLI, Rule 27 of CPC claiming that they have made the construction by obtaining the license from the Quepem Municipal Council, however, the said license was inadvertently not produced before the Trial Court. It was in these circumstances that the learned District Judge has remanded the matter, with a direction to the Trial Court to allow the respondents to produce the documents and permit cross examination of the witness of the respondents on the documents produced and then pass suitable orders.

9. Under Order XLI, Rule 27 of CPC, the Appellate Court can permit production of additional evidence, whether oral or documentary, under three distinct circumstances, namely, (i)

where the Trial Court, has refused to admit evidence, which ought to have been admitted or (ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed or (iii) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause.

10. The Constitution Bench of the Hon'ble Supreme Court in the case of **K. Venkataramiah Vs. A. Seetharama Reddy, 1963 LawSuit (SC) 28**, has inter alia held that one of the classes under which the Appellate Court can allow such production of additional document is where the Appellant Court requires such evidence either to pronounce the judgment or for any other substantial cause and while allowing such production, the Appellate Court shall record reasons for its admission as required by Rule 27(2) of Order XLI of CPC. It has however been held in para 13 of the judgment that the provision requiring recording of reasons, is not mandatory.

It has been further held that it does not seem to be reasonable to think that the legislature intended that even though in the circumstances of a case, it could be definitely ascertained from the record as to why the Appellate Court allowed the evidence and it is clear that the power was exercised within the limitation imposed by the first clause of the Rule, all that can be set at naught merely because the provision in the second clause was not complied with.

11. In the present case, the respondents claim that out of inadvertence the documents were not produced before the Trial Court. It cannot be said that it is an inherent lacuna, which is tried to be filled in by producing the documents. Even where the production is not sought under Rule 27(aa) of Order XLI of CPC, still there is power vesting in the Appellate Court to permit such production, to enable it to pronounce judgment or "for any other substantial cause". The facts and circumstances and the reasons articulated by the Appellate Court have to be read as a whole in order to decide whether the power was properly exercised. In the present case, I am unable to hold that there was any error in permitting production of documents, as the production

of documents, goes to the very root of the matter. Reliance placed on behalf of the appellant on the provisions of Order XLI, Rule 25 of CPC, to my mind is misplaced. Order XLI, Rule 25 caters to a contingency where the Trial Court has omitted or failed to frame or try an issue or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits. Thus, in the present case, the provisions of Order XLI, Rule 25 of CPC, cannot be attracted.

In my considered view, the appeal does not involve any substantial question of law. Consequently, the same is dismissed, with no order as to costs.

C. V. BHADANG, J.

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